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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TELEGRAPH SAVINGS & LOAN ASSOCIATION; WILLIAM E. STRASSER, EARL C. ROSE; PETER VAN OOSTERHOUT; A. R. GROVER; BAKER & McKENZIE,

Petitioners,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION as an insurance corporation and as RECEIVER of the seized assets and business of Telegraph Savings & Loan Association; FEDERAL HOME LOAN BANK BOARD; WILLIAM T. SCHILLING, individually and as Commissioner of savings and loan associations for the State of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the "prevailing party" requirement for a fee award in the private attorney general context of *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), must also be "read" into a statute authorizing the seizure by a federal agency of private property without notice, where the statute plainly authorizes a fee award to the challenging party; or does such a construction deny a citizen an opportunity to be heard in a meaningful manner and constitute a taking of his property in violation of Fifth Amendment due process.

2. Whether the sale of the assets and liabilities of a seized savings and loan association by the Federal Savings and Loan Insurance Corporation without complying with the prior public notice of sale and minimum waiting periods required by 12 C.F.R. §569a, and the subsequent retention of the resulting excess asset recovery of $17,550,000, violates the Fifth Amendment by depriving plaintiffs of their property without due process of law.

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Telegraph Savings and Loan Association, William E. Strasser, Earl C. Rose, Peter Van Oosterhout, A. R. Grover and Baker & McKenzie respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit which entered an order on December 5, 1986, affirming the entry of two orders by the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the judgments of the district court is reported at 807 F.2d 590 (7th Cir. 1987). The opinions of the United States District Court for the Northern District of Illinois rendering summary judgment dismissal of Count VII and denying Petitioners motion for attorney fees are reprinted in the appendix hereto, at pp. 10a-16a.

JURISDICTION

Petitioners brought their action in the district court invoking federal jurisdiction under 12 U.S.C. §1464(d)(6)(A), §1464(d)(1) together with §1729(c)(3)(A); 5 U.S.C. §702; 12 U.S.C. §1725(c)(4) and §1730(K)(1); 28 U.S.C. §1331, §1337, §1343, §1346(b) and §1391(e); 42 U.S.C. §1983; the Fifth and Fourteenth Amendments to the Constitution of the United States; the federal receivership; and the doctrine of pendent jurisdiction.

On December 6, 1984, the district court granted respondents' motion for summary judgment on Count VII and denied petitioners' motion for attorneys fees and costs.

On petitioners' appeal, the Seventh Circuit entered judgment and opinion on December 5, 1986, affirming the decisions of the district court. Petitioners filed this petition for a writ of certiorari within 90 days following denial, on February 2, 1987, of petitioners' request for a rehearing.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

Constitutional Provision

The Fifth Amendment to the Constitution of the United States of America provides in pertinent part that:

> "No person shall be . . . deprived of . . . property, without due process of law;"

Statutes

12 U.S.C. §1464(d)(8)(A)—the unamended statute:

> Any court having jurisdiction of any proceeding instituted under this subsection by an association or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets.

12 U.S.C. §1464(d)(8)(A)—as amended October 15, 1982:

> Any court having jurisdiction of any proceeding instituted under this subsection by an association or a director or officer thereof, may allow to any such party, which prevails, such reasonable expenses and attorneys fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets.

Regulations

12 C.F.R. §569a.6(c)(3):

> (c) *Assets, claims and contracts.* The Receiver shall have power to:

* * *

(3) Reject or repudiate any lease or contract which it considers burdensome. Prior to the final acceptance of any offer relating to the disposition of assets or property of any kind having an appraised value in excess of $25,000, but a book value of less than $100,000 or where the transaction involves consideration of more than $25,000, the Receiver shall publish a notice of such proposed transaction in a newspaper printed in the English language and of general circulation in the city or country in which the home office of the institution is located, inviting interested persons to submit in writing any comments or additional offer no later than 15 days from the date of publication, or such longer period as the Receiver may deem desirable. If no substantive objection from an interested person or additional offer is received, the proposed transaction may be consummated by the Receiver. * * *

[33 FR 14366, Sept. 24, 1968, as amended at 40 FR 46096, Oct. 6, 1975]

12 C.F.R. §569a.13:

§569a.13 *Purchase and assumption transactions.*

The requirements set forth in §§569a.5(a), 569a.6(c)(3), 569a.8, 569a.9 and 569a.10 shall not apply to the Corporation as receiver for an institution that becomes the subject of a purchase and assumption transaction.

[45 FR 76653, Nov. 20, 1980]

STATEMENT OF THE CASE

1. Facts

On May 22, 1980, the Illinois Commissioner of Savings and Loan Associations ("Commissioner") took immediate, unannounced custody of Plaintiff Telegraph Savings and Loan Association ("Telegraph") without giving notice. In so doing the Commissioner purported to act under the provisions of Ill. Rev. Stat. ch. 32, §848.

At the same time the Commissioner took custody, the Federal Home Loan Bank Board ("FHLBB" or "Bank Board"), pursuant to 12 U.S.C. §1729(c)(2), acting in *ex parte* proceedings and in concert with the Commissioner, appointed the Federal Savings Loan Insurance Corporation ("FSLIC") Receiver of Telegraph. The Commissioner transferred Telegraph to FSLIC, acting in its Receiver capacity, immediately upon taking custody.

The Receiver immediately sold the business of Telegraph by entering into a "purchase and assumption agreement" pursuant to 12 U.S.C. §1729(f)(2) whereby selected assets and the depositor accounts of Telegraph were sold to First Federal Savings and Loan Association of Chicago for "a premium of $17,550,000", which sum was designated by the Bank Board as "a premium . . . for the value of Telegraph as a going concern".

Telegraph received no prior written notice of the seizure action the Commissioner intended to take as was required by Ill. Rev. Stat. Ch. 32, §848, nor any prior notice of the action of the FHLBB.

2. The Proceedings Below

On June 2, 1980 Telegraph, together with an officer, directors and shareholders, filed a multi-count complaint pursuant to 12 U.S.C. §1464(d)(6)(A) to challenge custody, the receivership and the purchase and assumption transaction.

The District Court found in favor of the Bank Board and FSLIC on the central issue of Count III at the trial—the rationale of the Bank Board's standard of insolvency—and the Court of Appeals for the Seventh Circuit affirmed, *Telegraph v. Schilling,* 703 F.2d 1019 (7th Cir. 1983), *cert. denied,* 104 S. Ct. 51 (1983) (hereafter "*Telegraph*").

Both the District Court and the Seventh Circuit found that Telegraph had been seized without notice having been given. *Telegraph Savings and Loan Association v. Federal Savings and Loan Insurance Corporation et al.,* 564 F. Supp. 862, 867 (1981); *Telegraph* at 1021.

On December 6, 1984, the District Court granted FSLIC's motion for summary judgment on the challenge to the purchase and assumption agreement asserted in reserved Count VII of the complaint and the Seventh Circuit affirmed. See Appendix p. 1a.

Though the prior notice and waiting provisions of the Regulation which Telegraph relied on were in effect years before and after Congress authorized purchase and assumption agreements, the Seventh Circuit did not view this as determinative. It stated "Granted, it was not until several months after the transaction in this case that the Federal Home Loan Bank Board got around to issuing a regulation, 12 C.F.R. §569a.13 (1981), that expressly makes the provisions of section 569a on which Telegraph relies inapplicable to purchase and assumption transac-

tions; but the new regulation merely makes explicit what was already implicit." See Appendix p. 3a.

Also on December 6, 1984, the District Court denied Telegraph's motion for an award of attorney's fees filed 27 months after suit was filed and following trial on the insolvency issue. The motion was brought under 12 U.S.C. §1464(d)(8)(A) which provided that in a suit under the Home Owners Loan Act by an association, or a director or an officer of an association, the court "may allow to any such party such reasonable expenses and attorneys fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets." See Appendix p. 5a.

The Seventh Circuit, without reference to the legislative history of the unamended fee statute, held that the American rule that each litigant bears his legal expenses applied, and concluded that "prevailing" must be read into 12 U.S.C. §1464(d)(8)(A) between "any such" and "party" in the unamended statute on the authority of *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (hereafter "*Ruckelshaus*"). The Seventh Circuit stated:

> "This language [in *Ruckelshaus*] suggested as broad a delegation to the court as the language of the present statute; yet that did not prevent the Court from (in effect) inserting 'to the prevailing party' between 'award' and 'costs.' "

See Appendix p. 7a.[1]

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[1] Congress added "which prevails" to 12 U.S.C. §1464(d)(8)(A) twenty-eight months after the Complaint was filed and seven months after Telegraph's fee motion was brought. Though the Seventh Circuit found the amendment consistent with its conclusion, the decision of the Seventh Circuit was based on the unamended statute and *Ruckelshaus*.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S EXTENSION OF *RUCKLESHAUS'* PREVAILING PARTY REQUIREMENT IN PRIVATE ATTORNEY GENERAL LITIGATION TO SEIZURE OF PRIVATE PROPERTY WITHOUT NOTICE LITIGATION IS AN UNWARRANTED EXTENSION OF *RUCKELSHAUS* WHICH VIOLATES FIFTH AMENDMENT DUE PROCESS.

The scope of due process in deprivation of property cases is in issue in this case in stark profile. If left unreviewed and uncorrected, the decision of the Seventh Circuit below will enormously expand the power of federal agencies who are charged with regulation of businesses; it will effectively insulate them from judicial review of the most drastic action—seizure of private property without notice—within the agencies' arsenal of remedies. In short, any effective check on the power of regulatory agencies to seize property—whether done with the best of intentions or something less—will disappear.

It is not contended that in 1980 financial institutions run for profit should have been immune from searching oversight of their day-to-day operations. It is contended that in 1980 when events called for regulatory intervention by federal agencies that the regulated institution should have been given an opportunity to rebut the agencies intervention in a meaningful manner. Government agencies do make mistakes. *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974).

Here Telegraph experienced the now well understood interest rate "squeeze" of the early 1980's when it was forced to pay high rates of interest to obtain funds for

operation while earning far lesser sums from long term, low interest rate mortgage loans to home owners. The industry-wide result of the interest squeeze was a month by month depletion of net worth. The Bank Board and FSLIC were understandably concerned about Telegraph. So was Telegraph. Though Telegraph was highly liquid and well able to pay its obligations as they came due, its monthly balance sheet reflected a dropping net worth. Telegraph found an investor who made a proposal to infuse fresh capital on reasonable, negotiable terms, and Telegraph requested approval of the proposal from the Bank Board.

In response, the Bank Board abruptly rejected the proposal, participated in the seizure without notice to Telegraph and informed Telegraph's deposed officers and directors of the rejection of the recapitalization proposal after the association was seized.

After Telegraph sued and lost on the issue of whether it was insolvent within the meaning of 12 U.S.C. §1464(d)(6)(A) it was denied the right to compensate its attorneys out of its own assets[2]—not public funds—on the "prevailing party" rationale of the private attorney general statute in issue in *Ruckelshaus*.

The differences between the attorney fee statute of *Ruckelshaus*, Section 307(f) of The Clean Air Act, 42 U.S.C. §7607(f), and the attorney fee statute here in issue, 12 U.S.C. §1464(d)(8)(A), and the underlying issues, are Constitutionally distinguishable.

In *Ruckelshaus*, adequate notice was provided to the concerned segment of the public; time was provided to

[2] held by the Receiver, FSLIC

marshall resources to contest the agency action. Here, the agency action occurred without notice, and control of the only realistic source of funds, the assets of the association, passed out of the owner's hands simultaneously with seizure. The association, its officers and directors were unexpectedly and effectively deprived of the means of meaningfully contesting the agency action.

In *Ruckelshaus*, the plaintiffs sought compensation from public monies. Here, the plaintiffs seek only to use their own assets to pay their attorney's fees.[3]

In *Ruckelshaus*, the plaintiffs were voluntarily combatting the rule-making authority of an administrative agency in order to further the interests of the public in environmental protection. Telegraph, on the other hand, is attempting to exercise its statutorily created and constitutionally mandated rights to challenge meaningfully an *ex parte* seizure without notice. This Court has long recognized that the interests of the public-at-large are vastly different than those of individuals affected by a special administrative act. *Londoner v. Denver,* 210 U.S. 373 (1908). *Compare Bimetallic Inc. Co. v. State Board of Equalization,* 239 U.S. 441 (1915) (*Londoner* distinguished on basis of a small number of people who were "exceptionally affected, in each case upon individual grounds.").

In *Ruckelshaus* the majority believed the legislative history underlying the fee statute was susceptible of differing interpretations from which this court concluded "when appropriate" meant "prevailing".

[3] Telegraph's assets included over $100,000,000 of mortgage notes which generated large amounts of revenue month after month in the hands of the Receiver.

Here, the legislative history of the Financial Institutions Supervisory Act of 1966 ("1966 Act"), which added §1464(d)(8)(A) to the HOLA, clearly shows that Congress intended reasonable expenses and attorneys' fees to be awarded to associations contesting the FHLBB's appointment of a receiver in just and proper litigation without regard to success.[4]

Specifically:

Prior to the 1966 Act, supervisory action by the FHLBB required a prior hearing with advance notice: the FHLBB could not seize the association's assets until after the hearing. Thus, an association wishing to challenge the FHLBB's actions could simply pay its expenses and attorneys' fees out of its assets, to which the association continued to have access during the pendency of the hearing.

As originally introduced in the Senate, the 1966 Act made no provision for the award of reasonable expenses and attorneys' fees. §3158, 89th Cong., 2d Sess. (1966). However, the U.S. League of Savings Associations argued before the subcommittee of the Senate Committee on Banking and Currency that attorneys' fees were necessary,

> [i]n order that the exercise of such rights [the right to challenge the imposition of a Federal receivership]

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[4] In approving a $600,000 award of attorneys fees which was not appealed by FSLIC, the only other court presented with this issue expressly held that the unamended statute embodied no "prevailing party" requirement. "Hence, it is concluded that a reasonable construction of the attorney fee provision cannot and does not require the condition that attorneys fees and expenses will only be awarded to the association if it prevails[.]" *Washington Federal Savings and Loan Association v. Federal Home Loan Bank Board, et al.*, No. 80C-443, transcript at 37-38 (N.D. Ohio, Sept. 4, 1981, unreported).

> shall not be unfairly impeded by the omission of provision for the payment of costs and expenses of such proceedings from the assets of the association affected, the league requests this committee to insert in the bill a provision . . . which would provide for such expenses as may be approved by the court.

Id. at 186 (statement of W.O. Duvall). The intent of the Senate in adopting the provision is made clear from the Senate report accompanying the bill:

> Any court having jurisdiction of any proceeding instituted under the proposed amended section 5(d) by any association or director or officer, could allow to any such party such reasonable expenses and attorneys' fees as the court deems just and proper, to be paid by the association or from its assets.

S. Rep. No. 1482, 89th Cong., 2d Sess., 15 (1966).

Given the complexity of the issues and the vast governmental resources available to the FHLBB and FSLIC, the denial of Telegraph's right to use its own resources to defend the seizure of its assets constitutes a taking of property without due process of law and violates the Fifth Amendment. Due process requires that no property be taken without "an opportunity . . . granted at a meaningful time and in *a meaningful manner* . . . for [a] hearing appropriate to the nature of the case[.]" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (citations omitted; emphasis added). Due process generally requires that the hearing must be conducted prior to the taking of property. Only in situations where this predeprivation hearing is impractical or impossible, and some valid governmental interest is at stake, may the hearing be postponed until after the taking. *Arnett v. Kennedy*, 416.U.S. 134 (1974); *Fahey v. Mallone*, 332 U.S. 245 (1947). A postdeprivation remedy satisfies procedural due process requirements only where the necessity of quick action or

the impracticality of providing a meaningful predeprivation hearing is coupled with the availability of some "meaningful opportunity . . . for a determination of rights and liabilities." *Parratt v. Taylor*, 451 U.S. 527, 541 (1981).

The due process standard to be applied in evaluating a judicial or administrative procedure is one of "fundamental fairness." *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). In determining what "fundamental fairness" requires, this Court has adopted a fact balancing approach in determining whether the requirements of due process have been met. This requires consideration of three factors, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1956).

The first due process factor is the private interest asserted by Telegraph. Telegraph's interest is one of constitutional force—the deprivation of property without due process of law.

The second due process factor requires examination of the risk of erroneous deprivation and probable value of additional safeguards. Since any deprivation under the draconian act of seizure without notice potentially may be erroneous, meaningful judicial review is constitutionally mandated. The intricate circumstances surrounding all seizures of associations make any such seizure prone to great risk of error. The probable value of additional safeguards is, in contrast, extremely high.[5]

The third due process factor, the government interest, is not impinged by the attorney's fees requirement. The

[5] The fee statute has contained a "just and proper" condition since its enactment which provides the district court with the means to guard against abuse.

attorneys' fees are payable out of the assets of the seized association and not out of taxpayers' dollars.

A balancing of the three factors in the due process analysis compels the conclusion that Telegraph was deprived of due process of law.

The notion of the Seventh Circuit in this case that Telegraph, its officers, directors and shareholders do not need provision for payment of counsel regardless of the outcome is unrealistic.[6] The facts known to Telegraph and its counsel at the start of litigation were that Telegraph's assets had been removed from its control and the opposing party was a U.S. government agency with vast economic resources and a staff of in-house and retained counsel of great skill and experience. Many issues to be decided were complex and required vigorous discovery, and *many of the issues were issues of first impression.*

To suggest that lawyers were available to Telegraph on a contingency fee basis does not recognize business realities. Common sense dictates that no lawyer with sufficient skill to recognize the issues and to draft a complaint would take such litigation on a contingent fee basis.

The panel failed to appreciate the difference between anti-trust and creditors rights litigation and this litigation. In the anti-trust and creditors rights fields an established

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[6] Indeed, the Seventh Circuit even considered Telegraph's counsel to have accepted representation on a contingent fee. However, the Seventh Circuit misinterpreted the fee agreement in this litigation. The agreement provided for a bonus for a successful outcome in this highly complex, meritorious and unique litigation, a common occurrence. But the underlying compensation is an hourly rate regardless of outcome. A contingent fee contract in Illinois means if there is no recovery, there is no fee. *Pocius v. Halvorsen*, 30 Ill. 2d 73, 195 N.E.2d 137 (1964).

body of law exists from which a judgment of the likelihood of success can be made on known, or reasonably discoverable, facts. Here, no guidelines, factual or legal, existed. Here, Telegraph faced 10 day and 30 day statutes of limitations to bring suit; time periods far shorter than generally available to anti-trust claimants. Neither the facts nor logic support the conclusion that counsel would have been available to Telegraph if the fee statute included a "prevailing" qualification.

The legal issues involved in seizure litigation, especially at the time of the instant seizure, are far beyond the knowledge, skill and judgment of the most sophisticated businessman as the record of this litigation shows; representation by able counsel is a necessity. If no mechanism existed to ensure that the enormous legal time and effort required to challenge seizure actions would have been compensated, the victims of seizures will simply have gone unrepresented.

The need to define the reach of *Ruckelshaus* warrants the granting of the petition for a writ of certiorari in this case.

II.

THE SEVENTH CIRCUIT'S VIEW THAT REGULATION 569a'S PUBLIC NOTICE AND WAITING PERIOD FOR SALE OF SEIZED PROPERTY WAS INAPPLICABLE, AND ITS REFUSAL TO ORDER FSLIC TO TURN OVER THE $17,550,000 EXCESS ASSET RECOVERY TO TELEGRAPH'S SHAREHOLDERS, IS INCONSISTENT WITH THE PLAIN WORDS OF REGULATION 569a AND DEPRIVED TELEGRAPH OF ITS PROPERTY WITHOUT DUE PROCESS.

The Seventh Circuit's conclusion that Regulation 569a was not applicable to the quick sale of Telegraph's busi-

ness cannot be squared with the principle that an agency must follow its own regulations, *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957). By deferring to the agency's interpretation of a regulation which the agency obviously found inconvenient to its immediate purpose, the Seventh Circuit altered the industry rules without warning to the affected parties, Telegraph and its shareholders.

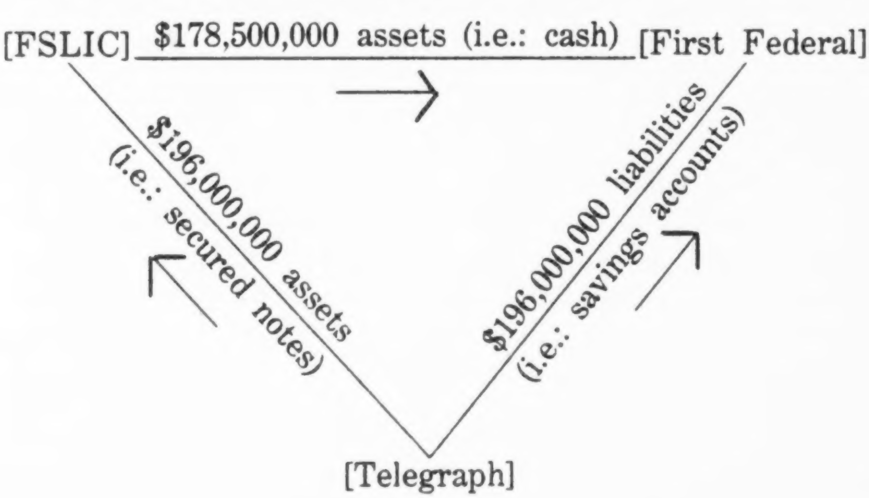
The prior public notice and 15 day waiting period of Regulation 569a were plainly designed to maximize the consideration received by FSLIC on the disposal of the business of a seized association. The stake of Telegraph and its shareholders in maximization of the proceeds of disposal of its business is significant since recoveries over and above the amount needed to make FSLIC whole belonged to Telegraph and its shareholders. Had prospective bidders for the pieces of Telegraph's business been aware of the availability of Telegraph and had they had 15 days to prepare carefully considered bids, a much higher bid might have been obtained.

Regulation 569a had the force and effect of law since its publication in the Federal Register and was therefore binding on the Bank Board and FSLIC until it was officially and publicly changed, *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). Since the sale of Telegraph was made in violation of Regulation 569a, it was illegal and of no effect, *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1949).

The Seventh Circuit's approval of the agency's unpublished sale on the ground the regulation was "not promulgated with such [purchase and assumption] transactions in mind" is unavailing. See Appendix p. 3a. When Congress adds new substantive provisions to an existing statutory scheme for which regulations are already in place,

it must be assumed that Congress intended those regulations to apply to the new provisions because an agency is as much bound by its own properly promulgated rules as the persons affected by them. *Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932).

The $17,550,000 excess asset recovery which FSLIC experienced as a result of the three party purchase and assumption transaction can be understood by the following simplified representation of the transaction.



Using the book value method of accounting which was earlier mandated in *Telegraph*, at pp. 1027, 1028 and focusing on funds transferred in and out of FSLIC, it will be seen that FSLIC received $196,000,000 mortgage notes secured by mortgages on homes, and paid out $178,500,000 in cash; the difference is $17.5 million. The third party, First Federal Savings and Loan Association of Chicago, experienced a book value deficit of $17.5 million on the transaction. However, First Federal willingly entered into the agreement because it was common knowledge at the time of the transaction that First Federal could earn more

from Telegraph's five business locations, its experienced staff, customer base, good will, and the $178.5 million cash it received from FSLIC than it would have to pay out on the $196 million of Telegraph's deposit accounts which it assumed.

The Seventh Circuit explained away FSLIC's $17.5 million excess asset recovery by stating that the mortgage notes were worth less than face value when evaluated by a market value standard. This holding is inconsistent with the decision of a prior panel of the Seventh Circuit that the book value method of accounting governs this litigation. *Telegraph*, at pp. 1027, 1028.

The need to clarify how far a federal agency may go in failing to follow regulations which are clear on their face when application of those regulations may be inconvenient to the agency, and the need to clarify the appropriate accounting standard, book value or market value, to be used in supervisory action cases administered by the Bank Board, warrant the granting of the petition for a writ of certiorari in this case.

CONCLUSION

For these reasons, petitioners request this Court to issue a writ of certiorari to review the holding of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1041

TELEGRAPH SAVINGS AND LOAN ASSOCIATION, et al.,
Plaintiffs-Appellants,

v.

WILLIAM J. SCHILLING, FEDERAL HOME LOAN BANK BOARD, and FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 2792—**John F. Grady**, *Judge.*

ARGUED SEPTEMBER 9, 1986—DECIDED DECEMBER 5, 1986

Before POSNER and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* In 1980 the Federal Home Loan Bank Board determined that Telegraph Savings & Loan Association was insolvent and appointed the Federal Savings & Loan Insurance Corporation (FSLIC), the federal agency that insures deposits in savings and loan associations, as receiver. On the same day FSLIC entered into a "purchase and assumption" transaction with First Federal Savings & Loan Association, whereby First Federal agreed, effective the next day, to assume Telegraph's liabilities (mainly to its depositors) in exchange for a cash

payment from FSLIC plus Telegraph's "good" assets (furniture, fixtures, etc.). FSLIC was left to try to recoup the cash payment it had made to First Federal from Telegraph's loan portfolio, which FSLIC retained. Telegraph brought this suit against FSLIC, challenging the determination of insolvency, the appointment of the receiver, and the legality of the purchase and assumption transaction, and seeking the return of its assets. (There are other parties on both sides, but they are not important to this appeal.) The district court resolved all issues against Telegraph. In a previous appeal we upheld the court's rulings with respect to the determination of insolvency and the appointment of the receiver. *Telegraph Savings & Loan Ass'n v. Schilling,* 703 F.2d 1019 (7th Cir. 1983). The present appeal is from the district court's rejection of Telegraph's challenge to the legality of the purchase and assumption transaction, and from its refusal to award Telegraph some $500,000 in attorney's fees for Telegraph's strenuous though unsuccessful efforts in this litigation.

The purchase and assumption method of liquidating an insolvent savings and loan association is expressly authorized by 12 U.S.C. § 1729(f)(2), passed in 1978 and modeled on a statute applicable to and frequently used by the Federal Deposit Insurance Corporation in dealing with bank failures. See 12 U.S.C. § 1823(f); H.R. Rep. No. 1383, 95th Cong., 2d Sess. 40 (1978); Burgee, *Purchase and Assumption Transactions Under the Federal Deposit Insurance Act,* 14 Forum 1146, 1154-60 (1979); cf. S. Rep. No. 536, 97th Cong., 2d Sess. 7 (1982). Instead of paying the depositors—a procedure that both is time-consuming and does nothing for depositors insofar as their deposits exceed the insured limit—the FDIC or FSLIC, as the case may be, persuades another financial institution to assume the insolvent institution's liabilities to depositors. See, e.g., *Corbin v. Federal Reserve Bank of New York,* 475 F. Supp. 1060, 1063-65 (S.D.N.Y. 1979), aff'd, 629 F.2d 233 (2d Cir. 1980). Whether the agency pays the depositors directly or pays another financial institution to assume liability to them, the agency seeks to recoup the payment

out of the assets of the insolvent institution. The advantage to the agency of the purchase and assumption technique is that it preserves the going-concern value of the failed institution and thus reduces the agency's loss by the excess of that value over the liquidation value of the institution. The disadvantage is that the agency makes depositors whole beyond the limits of its insurance liability to them.

Telegraph does not question the legality of the purchase and assumption transaction as such but insists that there must be 15 days' public notice of it. A regulation of the Federal Home Loan Bank Board, 12 C.F.R. § 569a (1980), requires such notice in the case of a sale of the assets of a savings and loan association by a receiver; and such a sale took place here. But we do not think the regulation is applicable. It was promulgated ten years before FSLIC was authorized by 12 U.S.C. § 1729(f)(2) to engage in purchase and assumption transactions, and not only was it not promulgated with such transactions in mind, but, if applied to them, it would frustrate them. A purchase and assumption transaction will not work unless it is completed before the depositors know that their savings and loan association is insolvent and in receivership. For once they find out, they will begin withdrawing their deposits, and there will be little or nothing for the assuming association (First Federal here) to assume. *In re Franklin Nat'l Bank*, 381 F. Supp. 1390, 1392, 1393 (E.D.N.Y. 1974); *In re American City Bank & Trust Co.*, 402 F. Supp. 1229, 1231 (E.D. Wis. 1975). Blocking withdrawals will anger the depositors, making it difficult to induce them to transfer their loyalties to the assuming institution; so FSLIC will lose the going-concern premium to which it looks to reduce its losses on the transaction. Deposit insurance will not necessarily prevent a "run," since it takes time to collect and since some depositors have deposits in excess of the insurance limit.

Granted, it was not till several months after the transaction in this case that the Federal Home Loan Bank Board got around to issuing a regulation, 12 C.F.R.

§ 569a.13 (1981), that expressly makes the provisions of section 569a on which Telegraph relies inapplicable to purchase and assumption transactions; but the new regulation simply makes explicit what was already implicit. For we think it more sensible to view the statute, 12 U.S.C. § 1729(f)(2), as limiting the scope of a previously issued regulation than to view the previously issued regulation as preventing the board (unless and until it expressly changed the regulation) from effectuating the policy of the subsequently enacted statute.

It may seem that without some sort of public notice there can be no assurance that the receiver will strike the most advantageous bargain for the disposition of the insolvent institution's assets. But FSLIC knows which savings and loan associations might be interested in assuming an insolvent association's liabilities, and before making a purchase and assumption transaction it shops the interested associations, seeking the best deal. Only it does so quietly, without tipping off the depositors. Public notice would not produce better deals; it would kill the possibility of any deal; it would nullify the purchase and assumption device that Congress has expressly authorized FSLIC to use.

We add that FSLIC has a greater interest in arranging an orderly liquidation than the stockholders of the insolvent association. When the Federal Home Loan Bank Board declared Telegraph insolvent, the market value of its liabilities exceeded that of its assets by between $30 and $37 million. This meant that the stockholders had been wiped out and that FSLIC, as the insurer of the principal creditors of the association (the depositors), faced a potential loss of that magnitude. By its deal with First Federal, FSLIC managed to reduce its expected loss to roughly $12.5 million. Had it been able to find another association willing to accept an even smaller amount in exchange for assuming Telegraph's liabilities, it would have done so. It may have driven too hard a bargain, because First Federal itself later went broke and another purchase and assumption transaction had to be arranged.

But what is hardly plausible is that by giving public notice FSLIC could have driven an even harder bargain; probably it would not have been able to drive any bargain.

The other issue in this appeal is whether the district court erred in refusing to order FSLIC to pay the attorney's fees that Telegraph incurred in this unsuccessful litigation to recover Telegraph's assets. Prior to its amendment in 1982 (the parties agree that the unamended statute governs this case), 12 U.S.C. § 1464(d)(8)(A) provided that in a suit under the Home Owners' Loan Act by an association, or a director or officer of an association, the court "may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets." The district judge refused to award attorney's fees to Telegraph on two grounds: the statute does not authorize an award of fees to the losing party; in any event the just and proper award is zero because the lawsuit was "completely lacking in merit." We agree with the first ground, so need not consider the second.

The statute was amended in 1982 by inserting "which prevails" after "any such party." Telegraph argues that this shows that the unamended statute allows an award of attorney's fees to the losing party. It adds that since the winning party can always pay himself his fee out of the association's assets, the statute must be for the benefit of the losing party, or it has no force. Of course, if the second argument were correct, it would mean that the 1982 amendment was senseless; but it is not correct. Receivership contests are not the only type of litigation under the Home Owners' Loan Act, and in most other types of litigation under the Act the plaintiff will not control the association's assets even if he wins the suit. The plaintiff may not be the association, but an officer or director. And even if the plaintiff is the association, it may obtain relief without recovering all of its assets, and in such a case it may have a claim for attorney's fees to be paid out of the assets remaining in the receiver's hands.

As for the 1982 amendment, there is no indication that Congress thought it was changing the existing law rather than merely clarifying it. If all amendments were deemed to change the existing law, Congress would find it hard to make merely clarifying amendments. The only pertinent legislative history is the following statement in the Senate Report: "This section would clarify that a court may assess attorneys' fees against the Bank Board only in the event the agency *loses* a lawsuit." S. Rep. No. 536, 97th Cong., 2d Sess. 59 (1982) (emphasis in original). We are given no reason not to take this language at face value. We realize the danger in relying on postenactment legislative history. A later Congress, more realistically a committee of a later Congress, seeking to undo a deal struck by an earlier one without passing retroactive legislation, may, by describing prospective legislation as "clarifying," seek to give it a retroactive effect by influencing judicial interpretation of the original law. But if that is a possibility here, Telegraph must persuade us so; and it has not carried this burden. Cf. *In re Tarnow,* 749 F.2d 464, 467 (7th Cir. 1984).

Telegraph's last argument, which is not only unpersuasive but shows the basic error of its position, is that unless the association can pay its attorneys out of the association's assets whether it wins or loses the case, it will not be able to finance litigation challenging FSLIC's seizure of its assets. Contingent-fee contracts exist to finance litigation in which the plaintiff has no assets other than what the litigation may yield him if he wins; and in fact Telegraph had a contingent-fee arrangement with its lawyers in this case, under which they would have received up to 25 percent of the value of the assets recovered by the suit if any had been recovered. If a firm is snuffed out by a competitor and brings an antitrust suit, it can obtain legal representation, even though it has no assets other than its antitrust claim, by signing a contingent-fee contract. If, coming closer to home, a creditor seizes all of a debtor's assets, the debtor, if he thinks the seizure was wrongful, will hire a lawyer on a contingent-fee basis to contest it.

Telegraph is contending for a reading of the statute under which losing plaintiffs would routinely recover their attorney's fees from winning defendants. So startling a reversal of the traditional rules of the game should not be lightly imputed to Congress. The standard American rule is that even a winning litigant must bear his legal expenses, *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); it would be grotesque to suppose that he must bear the loser's as well. That would be the effect of giving Telegraph its attorney's fees. Not only would FSLIC have incurred its own legal expenses in defending the seizure of Telegraph's assets; those assets, out of which it seeks to recoup the expense of paying First Federal to assume Telegraph's liabilities, would be further depleted by being applied to defray Telegraph's legal expenses. By making litigation a free good to Telegraph, this approach would encourage Telegraph to persist, as it has done, in a losing lawsuit. This is not what Congress had in mind when it enacted the fee-shifting statute. It meant to lighten the burden of meritorious litigation to the winner.

In *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Supreme Court rejected the argument that a court could award the loser his attorney's fees under a statute (42 U.S.C. § 7607(f), part of the Clean Air Act) which provided that "in any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate." This language suggested as broad a delegation to the court as the language of the present statute; yet that did not prevent the Court from (in effect) inserting "to the prevailing party" between "award" and "costs." In *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 829 (7th Cir. 1984) (dictum), we made a similar insertion in a statute (29 U.S.C. § 1132(g)(1), part of ERISA) which provides that "in any action . . . , the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." See also *Avoyelles Sportsmen's League v. Marsh*, 786 F.2d 631,

634 (5th Cir. 1986); *Fase v. Seafarers Welfare & Pension Plan*, 589 F.2d 112, 116 (2d Cir. 1978) (dictum) (Friendly J.).

There is only a superficial appeal to Telegraph's argument that it should be entitled to contest the seizure of "its" assets. It was allowed to contest the seizure, and very vigorously has it done so. The litigation has shown that the assets are not its assets but FSLIC's. As the representative of Telegraph's principal unsecured creditors, the depositors, FSLIC has—much like a trustee in bankruptcy—seized the assets of its insolvent creditor in an effort to minimize its losses. And losses there have been. Although Telegraph speaks loosely, indeed wildly, of FSLIC having made a "profit" by arranging the purchase and assumption transaction with First Federal, the transaction yielded not a profit but a reduction in loss. The loss will still be in the millions. We can think of no reason why that loss should be augmented by forcing FSLIC to pay the legal expenses incurred by its debtor in litigation in which the debtor has unsuccessfully sought to prevent FSLIC from minimizing FSLIC's loss.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 2, 1987.

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

TELEGRAPH SAVINGS AND LOAN ASSOCIATION, et al.,
Plaintiffs-Appellants,

No. 85-1041 v.

WILLIAM J. SCHILLING, FEDERAL HOME LOAN BANK BOARD, and FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80 C 2792—**John F. Grady**, *Judge*.

ORDER

On January 6, 1987, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TELEGRAPH SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

No. 80 C 2792 v.

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, et al.,

Defendants.

JUDGMENT ORDER

Defendants have moved to dismiss Count VII of the second amended complaint and have supported their motion with the affidavits of Lawrence W. Hayes and Gene L. Hall, so that the motion is now converted to one for summary judgment. Based upon the affidavits, and the memoranda of law submitted by the parties, the court finds that the purchase and assumption agreement carried out in this case was not subject to the notice requirement of 12 C.F.R. § 569a6(c)(3). The purchase and assumption transaction in this case did not violate any statute or regulation called to the court's attention and appears to have been proper in all respects.

Accordingly, summary judgment is entered in favor of the defendants and against the plaintiffs on Count VII of the second amended complaint.

DATED: DEC 6 1984

ENTER: /s/ JOHN F. GRADY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TELEGRAPH SAVINGS AND LOAN ASSOCIATION, et al.,
Plaintiffs,

No. 80 C 2792 v.

FEDERAL SAVINGS AND LOAN
INSURANCE CORPORATION, et al.,

Defendants.

ORDER

Plaintiffs have filed a motion for an award of interim attorneys fees and expenses, totalling $498,168.21 through January 31, 1982. They seek recovery under 12 U.S.C. § 1464(d)(8)(A), which, before its amendment on October 15, 1982, provided in pertinent part:

> Any court having jurisdiction of any proceeding instituted under this subsection by an association or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets.

Since this statute authorizes payment of fees and expenses only from assets of the association, and plaintiffs seek payment only from such assets, a threshold question is whether there are any remaining assets of Telegraph Savings and Loan Association. Defendants contend that the association no longer exists and that its former assets were purchased by First Federal Savings and Loan Association. Moreover, in the defendants' view, Telegraph has no "assets" in any event, since it was insolvent at the time

the receiver took over. Plaintiffs argue, on the other hand, that funds properly belonging to Telegraph are in the hands of the FSLIC and are assets of the association from which payment of fees and expenses can be made.

I would need further development of this issue before I could determine whether there are any assets of the association still available at this time. But even if there were assets available, I have determined that plaintiffs' motion for fees and expenses should be denied, for two reasons.

I.

The government argues that the statute contemplates awards of fees and expenses only to parties who "prevail" in litigation. Plaintiffs counter with Judge Thomas' observations in the *Washington Federal* case to the effect that, if the receivership is set aside the association could pay the fees itself from the assets that would be returned to it. No court order would be necessary. Defendants cite a number of examples of situations where they say the statute could be relied upon to pay the fees and expenses of successful litigants, but in most of those examples it seems to me that the association would have the authority to pay even if there were no statute. Surely the payment of litigation expenses is not so extraordinary that statutory authorization is required.

There is, however, a better argument for defendants on this question of whether the statute contemplates only prevailing parties. On October 15, 1982, the statute was amended to say precisely that. It now provides that the court

> . . . may allow to any such party, which prevails, such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the association or from its assets.

The only legislative history cited by either party on the amendment is Senate Report No. 97-536, on the Depository

Institutions Amendments of 1982, 97th Cong. 2d Sess. p. 59, which states:

> Section 351. Payment of Attorneys' Fees—This section would clarify that a court may assess attorneys' fees against the Bank Board only in the event the agency loses a lawsuit.

Defendants argue that this "clarification" makes clear what was intended all along.[1] Plaintiffs take the opposite view, arguing that the amendment brings the prevailing party requirement into the statute for the first time. Plaintiffs further contend that the amendment can be given effect only prospectively. They also argue that the amendment would be unconstitutional if applied to Telegraph, since to deny Telegraph access to its own funds to pay litigation fees and expenses would deprive it of the right to be heard "in a meaningful manner."

It seeks to me that the defendants have the better of this argument. I recognize the apparent anomoly pointed out by Judge Thomas and might be persuaded by his analysis in the absence of any strong judicial or legislative authority supporting the defendants' view. But I believe the language of both the majority and dissenting opinions in *Ruckelshaus v. Sierra Club,* ____ U.S. ____, 103 S.Ct. 3274 (1983), and the 1982 amendment of the statute itself require me to find that the statute, even prior to amendment, was limited to prevailing parties.

In *Ruckelshaus*, the statute in question (the Clean Air Act) provided that the court could award attorney's fees "whenever it determines that such an award is appropriate," without expressly limiting recovery to prevailing parties. 103 S.Ct. at 3276. The Supreme Court held that by using the word "appropriate," Congress intended to limit recovery to parties who had prevailed on at least some significant aspect of the case. 103 S.Ct. at 3281. The dissenting opinion, written by Justice Stevens and concurred in by three other justices, took the view that it would be "appropriate" within the meaning of the statute to award fees to a nonprevailing party under certain limited conditions:

> . . . I cannot agree with the Court's interpretation of the statutory language. Congress decided that in exceptional circumstances it might be "appropriate" to award attorney's fees to nonprevailing parties. Of course, as the Court of Appeals recognized, it would be unreasonable to presume, against the background of attorney's fees statutes generally, that Congress intended fees to be awarded to every nonprevailing party who has litigated a nonfrivolous challenge to an EPA regulation. (citation omitted) The degree of success or failure should certainly be weighed in the balance to determine whether it is appropriate to require the Government to bear its adversary's costs of litigation. In my view it would be an abuse of discretion for the Court of Appeals to award fees to a nonprevailing party unless its contribution to the process of judicial review, or to the implementation of the Act by the agency, had truly been substantial and had furthered the goals of the Clean Air Act.

103 S.Ct. at 3290.

It appears to me that the language "such reasonable expenses and attorneys' fees as it deems just and proper . . . ," appearing in 12 U.S.C. § 1464(d)(8)(A), are the substantial equivalent of "whenever it determines that such an award is appropriate" in the Clean Air Act, 42 U.S.C. § 7607(f), involved in *Ruckelshaus*. Even if it were not, the word "appropriate" seems fairly implied in the language used in § 1464(d)(8)(A); it would be a startling argument to say that the court should make an award that is "inappropriate." *Ruckelshaus*, therefore, seems to compel the conclusion that, even before the amendment, § 1464(d)(8)(A) was not a departure "from the long established rule that complete winners need not pay complete losers for suing them." 103 S.Ct. at 3279.

Added to *Ruckelshaus*, however, is the 1982 amendment, which, according to the Senate Report, "clarifies" rather than changes the meaning of the statute. Even without the Senate Report, the amendment seems better construed as a clarification than a change. *See Brown v.*

Marquette Sav. and Loan Ass'n., 686 F.2d 608, 615 (7th Cir. 1982).

As far as plaintiffs' due process argument is concerned, they raise it in the wrong case. Their claims have been exhaustively considered both here and on appeal. If their attorneys were worried about being paid, that worry was not reflected in any reluctance to prosecute the case to the hilt.

II.

If the statute did permit an award to a nonprevailing party, I would still deny plaintiffs' motion. The statute provides that the court "may" award such fees and expenses as it "deems just and proper," and thus an exercise of the court's sound discretion is called for. Several factors prompt me to deny relief in this case.

First, the plaintiffs' lawsuit was completely lacking in merit. While questions of "first impression" were raised, the resolution of those questions was the total and uniform rejection of every theory put forward by the plaintiffs. I denied summary judgment and held a trial only because plaintiffs represented that they were going to offer evidence that defendants' projections of insolvency were unreasonable. At the trial, that theory was totally abandoned and instead plaintiffs offered an array of arguments supported only by makeshift accounting theories that seemed to develop as the case went along. The trial resulted in a judgment for defendants on Count III. Judgment was also entered against plaintiffs on numerous other counts,[2] and they appealed. *Telegraph Sav. & Loan Ass'n v. Schilling,* 703 F.2d 1019 (7th Cir. 1983). The Court of Appeals noted that ". . . Telegraph attempts to support its position with a myriad of arguments, some of which are unsupported by legal authority," (703 F.2d at 1023); that "citing no authority supporting its position, Telegraph would have us believe that it is always entitled to challenge a FSLIC receivership in state court." (*Id.* at 1024); and that Telegraph "cites no authority for its contention that the rights involved in this case are prop-

erty and contract rights requiring strict scrutiny." *Id.* at 1029. The Court of Appeals dealt only in a footnote with plaintiffs' arguments concerning the dismissal of six additional counts of the complaint, and, without even describing what the arguments were, held them "to be without merit." *Id.* at 1030 n. 9.

It has taken a great deal of time and effort to dispose of this case, but that is a comment on plaintiffs' persistence, not the merit of their claims. This is not a case where it can be said, as did the dissent in *Ruckelshaus*, that the contribution of a nonprevailing party to the process of judicial review, or to the implementation of the Act by the agency, had truly been substantial and had furthered the goals of the [Act]." 103 S.Ct. at 3290.

Another factor I consider is that a fee award in this case might well encourage other insolvent financial institutions to go to court when they have no prayer of a successful defense to governmental intervention. Granting that the decision in this case forecloses a number of possible arguments that might be made against future receiverships, it would be rash to suppose that there is a limit to the number of additional arguments that could be conceived and, of course, a receivership is only one kind of governmental action that can be challenged in court.

CONCLUSION

Plaintiffs' motion for an award of attorneys' fees and expenses is denied.

DATED: DEC 6 1984

ENTER: /s/ JOHN F. GRADY
United States District Judge

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[1] The statement in the Senate Report is not altogether helpful, inasmuch as it describes the statute as authorizing the assessment of attorneys' fees "against the Bank Board." The award, of course, is paid "by the association or from its assets."

[2] Judgment is being entered on another one, Count VII, today.